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In the
Supreme Court of the United States
OCTOBER TERM 1989

MARATHON OIL COMPANY, ET AL

Petitioners

VERSUS

McMORAN OFFSHORE EXPLORATION CO., et al

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

VOLUME I
APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA

TEXAS EASTERN TRANSMISSION
CORPORATION,

V.

McMoRAN OFFSHORE EXPLORATION
CO., ET AL.

Civil Action No. 83-1584 and
consolidated cases

Section "E" (2)

MARATHON OIL CO., ET AL

V.

McMoRAN OFFSHORE EXPLORATION
CO., ET AL

Civil Action No. 83-6275

SECTION "E/2"

June 30, 1987.

Marcel Livaudais, Jr., District Judge.

REASONS

Having granted the Motion of Defendants, ODECO, Inc., Faustug Marine Corporation, Tractug Associates and Continental Insurance Company to dismiss the claim of the plaintiffs, Marathon Oil Company, Amerada Hess Corporation, The Louisiana Land & Exploration Company, Aminoil U.S.A., Inc. and OKC Limited Partnership (hereinafter Marathon) pursuant to Fed. R. Civ. P. 41(b), I make the following Findings.

The claims of Marathon arise out of an incident occurring on December 31, 1982, through January 1, 1983 when anchors of the Drilling Rig OCEAN TRAVELER, owned by ODECO, Inc. caused a 20-inch natural gas pipeline owned by Texas Eastern

Transmission Corporation (hereinafter TETCO) to rupture. The plaintiffs allege they have suffered economic loss in the form of deferred oil and gas production sustained during the period in which the 20-inch TETCO line was out of commission.

At the close of plaintiffs' case, defendants, ODECO, Inc., Faustug Marine Corporation, Tractug Associates, and Continental Insurance Company moved for an involuntary dismissal pursuant to Fed. R. Civ. P. 41(b) arguing that since Marathon did not have a proprietary interest in the damaged pipeline, its claim should be dismissed under the Robins-Testbank[1] line

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1 Robins Drydock Company v. Flint, 75 U.S. 303 (1927) and State ex rel Guste v. M/V TESTBANK, 752 F.2d 1019 (5th Cir. 1985), Cert. den. 106 S.Ct. 3271 stand for the

of jurisprudence.

Marathon, while admitting it does not own the 20-inch damaged pipeline, submits that the facts of the case established that Marathon had in effect a "functional ownership" of the 20-inch pipeline and this "functional ownership" places Marathon's claim outside of the class of claims prohibited by the Robins-TESTBANK rule.

In 1971 Marathon Oil Company and TETCO entered into an "advance payment agreement" wherein TETCO advanced $5.5 million to Marathon for the exploration of gas in certain fields including Marathon's mineral

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general proposition that physical damage to a proprietary interest is a prerequisite to recovery for economic loss in cases of unintentional maritime tort.

lease of South Pass 89. In the period 1977 through 1983, Marathon drilled exploratory wells and discovered oil and gas reserves in South Pass 89. In 1981, representatives of Marathon appeared with representatives of TETCO before the Federal Energy Regulatory Commission to assist in TETCO's application for a certificate of convenience and necessity for the building of a twenty (20") inch pipeline from South Pass 89 to shore. The proposed pipeline was intended not only to provide access to the reserves in South Pass Block 89 but also to areas adjacent to Block 89.

On South Pass 89 platform A, natural gas and liquid hydrocarbons are processed, separated and then delivered into a six (6") inch pipeline owned and operated by

Marathon and transported to platform 89B where the gas hydrocarbons are separated from the liquid hydrocarbons and the gas is then processed, cleaned, scrubbed, compressed, cooled and delivered into the twenty (20") inch TETCO pipeline in a continuous flow from the well heads on 89A. On South Pass 89B, the high pressure gas from the well heads is reduced in pressure, separated, processed, cleaned and delivered into the twenty (20") inch trunk line. The low pressure gas produced on that platform undergoes similar processing but then goes through compressors and coolers prior to entering into TETCO's twenty (20") inch pipeline. (See Marathon Exhibit 37, attached to these Reasons)

On platform South Pass 89B, portions

of the platform have been leased to TETCO whereon TETCO constructed meter skids and paid to Marathon that portion of the construction costs of the platform equal to the square footage that each skid occupies in relation to the square footage of the entire platform. The meter skids are used, inter alia, to measure the amount of gas passing into the twenty (20") inch TETCO pipeline and are owned by TETCO. The exteriors of the skids are maintained by Marathon personnel and are interconnected to a system of flare, venting, and production lines of Marathon.

As the gas passes through TETCO's gas sales meters, ownership of the gas vests in TETCO in accordance with the gas purchase contract between Marathon and TETCO.

TETCO's twenty (20") inch pipeline runs down Platform 89B across the seabed of the Gulf of Mexico through Block 105 West Delta Area to the West Delta receiving station on shore in Venice, Louisiana.

Pilot valves owned, operated and serviced by Marathon are also part of TETCO's meter system. The pilot valves sense high and low pressures in the gas stream which readings are communicated to a master control panel of Marathon on each platform. When high or low pressure is detected, the master control panel automatically triggers Marathon's alarm and shut in system of the pipeline and all production wells and vessels on the platform. The pilot valves and related mechanisms are checked, maintained and

calibrated daily by Marathon personnel.

On platforms A and B South Pass 89 fifteen (15) feet above the Gulf of Mexico there exist valves in the twenty (20") inch TETCO line which are controlled and operated by Marathon's facilities and personnel. These valves sense high and low pressures in the gas stream and the readings as communicated to a master control panel on each platform. The valves will automatically shut down the wells upon a sensing of either high or low pressure in the pipeline. The valves can be remotely operated by Marathon personnel through any one of a number of manual stations located at exit points on the platforms in the event of a fire, collision or other emergency.

Necessary for the transportation of natural gas from 89 A and B is the achieving of a pressure differential which requires the compression and delivery of the gas at the upstream end of the pipeline at a constant high pressure which, in this system, is fixed at 1,100 to 1,200 psi. The natural gas that is delivered into the system is either reduced in pressure by Marathon production facilities or increased in pressure by mechanical means through high pressure compression facilities owned and operated by Marathon. Free water in the gas must be removed prior to entering the delivery system which is accomplished by the separating, processing and scrubbing facilities owned and operated by Marathon. To reduce incidents of corrosion and the

formation of hydrates in the twenty (20") inch trunk line, the natural gas must be cooled to certain acceptable temperatures. This is accomplished through after coolers on the Marathon pipeline which are also owned and operated by Marathon.

Forty-seven (47) miles from West Delta 89B, the twenty (20") inch pipeline comes ashore where it connects with TETCO's slug catcher which collects the liquid hydrocarbons, water condensate and hydrates that come out of the gaseous vapor during transportation from South Pass and West Delta to shore. For the slug catcher to operate, these liquids must be removed on a continuous basis. The slug catcher is tied into flow lines owned and operated by Marathon which remove the liquids from the

slug catcher and transfer these liquids into an oil tank for separation and allocation to Marathon.

Prior to entering the main transmission line, in order to avoid damage to down water facilities such as compressors, natural gas must be dehydrated within certain minimum requirements established by the industry which is expressed as not exceeding seven (7) pounds of water per million cubic feet of gas. From the slug catcher, the gas flows in a continuous stream through two dehydrators owned and operated by Marathon which removes the water molecules by flowing the gas molecules through a glycol bath.

Existing the dehydrators in Marathon lines, the natural gas is routed to

distillation facilities of the Warren gas plant where liquefiable hydrocarbons such as butane, propane and gasoline are removed from the gas stream. The processing of the gas by Warren is pursuant to contracts between Warren and Marathon where Marathon either receives a portion of the liquefiable hydrocarbons and/or their value.

Following the processing, the gas is then metered, analyzed and delivered back into the twenty (20") inch pipeline at the tailgate of the Warren plant for transportation to the thirty-six (36") inch transmission line of TETCO. The natural gas is transported approximately fifty (50) miles to its first TETCO compression station located at LaRose,

Louisiana.

At trial, it was established that Marathon paid for the cost and delivery of eight hundred eighty (880) feet of twenty (20") inch line in the integrated delivery system at the Warren plant. Although a representative of Marathon could not recall where the 880 feet of pipe was located, the pipe was clearly on shore in the vicinity of the Warren plant.

In the twenty (20") inch pipeline, approximately forty-seven (47) miles in length, packed with natural gas with a pressure of 1,150 pounds per square inch, a quantifiable thirty (30) million cubic feet of natural gas containing liquefiable hydrocarbons and liquids were in the delivery system at the time of the rupture.

At the moment of rupture, Marathon pilot valves on the platform detected the loss of pressure in the pipeline and communicated the failure to various control panels. These control panels activated other devices which closed off the wells and production aboard the platform including the valves in the trunk lines leading from Platforms 89A and 89B. With this rupture, thirty (30) million cubic feet of natural gas together with the liquids and liquefiable hydrocarbons were vented into the Gulf of Mexico and lost in the atmosphere. As a result of the rupture of the twenty (20") inch trunk line, all production, including oil and condensate, was automatically terminated on both platforms. The twenty (20") inch trunk

line was isolated by the closure of an underwater valve and this permitted West Delta, which was down stream of the rupture, to resume and continue production during the repair of the twenty (20") inch trunk line. In order to continue production on South Pass 89A and B, modifications were made to a twelve (12") inch Marathon oil pipeline which ran parallel to the twenty (20") inch TETCO line and production facilities to permit a commingling of the gas and oil into the twelve (12") inch line which required additional processing and separating facilities at the West Delta receiving station, a facility owned and operated by Marathon.

The above recited facts form the basis

for Marathon's assertion that although TETCO owned the damaged pipeline, Marathon had "incidents of ownership" of the pipeline sufficient to escape the bright line Rule enunciated in Robins-TESTBANK. This court is vested with jurisdiction pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C., §1331 et seq.

Counsel for the plaintiffs rely predominantly on Domar Ocean Transportation Ltd. v. M/V ANDREW MARTIN, 754 F.2d 616 (5th Cir. 1985) arguing that in the present case, Marathon is in a position similar to that of the plaintiff in ANDREW MARTIN, and Marathon like Domar Ocean Transportation Ltd. should recover for their alleged economic loss stemming from the damaged pipeline.

In ANDREW MARTIN, the plaintiff, owner of a barge, the DOMAR 7001, chartered the tug CINDY CENAC to tow DOMAR 7001. Although the tug was owned by Cenac Towing Company, the plaintiff had installed a raised pilot house on the tow so that it could be used in conjunction with the DOMAR 7001. While the two vessels were on their way to Tampa, Florida, the DOMAR 7001 was struck and rendered inoperable and forced to undergo repairs. While the barge was being repaired, the CINDY CENAC was subchartered by the plaintiff, but the plaintiff's earnings under the subcharter were less than it would have earned had the DOMAR 7001/CINDY CENAC combination been functional. The plaintiff sued for the difference between the amount of money it

received under the subcharter and the amount it would have received had the DOMAR 7001/CINDY CENAC combination been functional.

The Fifth Circuit explained that the plaintiff, after installing a raised pilot house on the CINDY CENAC, offered its customers the use of the DOMAR 7001 and the CINDY CENAC as a unit, not as two individual vessels. Therefore, since the vessels operated as an integrated unit, the Fifth Circuit held that the plaintiff had the requisite property interest in the combination so as to permit its recovery for the loss of the unit (for the loss of the DOMAR 7001 and the CINDY CENAC).

Marathon argues that the platform and pipeline facilities and the twenty (20")

inch TETCO pipeline "indisputably ... functioned as an integrated unit", ANDREW MARTIN at 619, and further that the expenditure by Domar in installing a raise pilot house aboard the CINDY CENAC is analogous to the advance payment agreement between Marathon and TETCO regarding exploration in the field and the subsequent construction of platforms and pipelines.

Marathon fails to recognize that in ANDREW MARTIN, Domar clearly sustained damage to a proprietary interest - the DOMAR 7001. Therefore, the bright line, created by the rule of Robins-TESTBANK was crossed in ANDREW MARTIN. In the case at hand, Marathon freely admitted that in bringing the claim for loss of production, it sustained no physical damage to any

property owned by Marathon.

Additionally, as is pointed out by the defendants, the case at hand, unlike ANDREW MARTIN does not involve the joinder of two pieces of property by one business enterprise to form a working whole used exclusively by Marathon to perform a business function. TETCO's twenty (20") inch pipeline was designed to be used by more than just Marathon. In fact, at the time of the rupture, Exxon was also processing gas through the twenty (20") inch TETCO pipeline.

In addition to its "integration" argument, Marathon argues that at the time of the rupture, it lost property in the form of liquids and liquefiable hydrocarbons that were in the pipeline

along with thirty (30) million cubic feet of natural gas.

Marathon has not made a claim for the loss of these liquid and liquefiable hydrocarbons. However, Marathon argues that its (alleged) ownership of the liquid and liquefiable hydrocarbons further shows that Marathon had a functional ownership interest in the damaged TETCO line. Evidence at trial showed that in accordance with the gas purchase contracts between Marathon and TETCO, ownership of the gas passed to TETCO at the inlet of TETCO's meter which is located on South Pass 89B. Once the gas reached the shore, Marathon had the option or right to remove liquefiable hydrocarbons from the gas and thereby take ownership of the hydrocarbons

only insofar as said extraction would not reduce the BTU content of the gas to substandard quality levels, as specified in the gas purchase contract. Marathon did not have an ownership interest in the gas which passed through TETCO's twenty (20") inch pipeline.

The Marathon platform and the TETCO pipeline in the case at hand were no more integrated than the bridge and railroad involved in the Fifth Circuit's decision in Louisville & N.R. Co. v. M/V BAYOU LACOMBE, 597 F.2d 469 (5th Cir. 1979). In BAYOU LACOMBE, the defendant corporation operated a vessel which struck a swing-span railroad bridge over the Tennessee River in Decatur, Alabama, causing the Louisville and Nashville Railroad Co., (Louisville) to

reroute its trains until repairs to the bridge were completed. Louisville sued for damages claiming that since it had a contractual right to use the bridge and contributed to the upkeep of the track, it had an interest sufficient to constitute a property right under the law of Alabama and therefore, recovery should not be barred by the Robins decision. The Fifth Circuit stated:

> Even if the Alabama Courts would classify the plaintiff's rights in the bridge as a form of property interest created by virtue of its contract with the owner, that interest would form too slender a reed upon which to base a right of recovery despite Robins

id. at 473. The Fifth Circuit also noted that Louisville had no obligation to repair the bridge or contribute to the cost of repairs once the bridge was damaged by a

third party and further, that Louisville in fact, did not contribute in repairing the bridge. Since Louisville did not have a proprietary interest in the bridge, the Fifth Circuit affirmed the district court in its granting of the summary judgment motion of the defendants.

Similar to the BAYOU LACOMBE case, in the case at hand, Marathon has the right to use the TETCO twenty (20") inch pipeline, but it does not have a proprietary interest in the pipeline or incidents of ownership at the level required to escape the Robins-TESTBANK prohibition. Additionally, Marathon made no contribution (for which it was not reimbursed by TETCO) toward upkeep or maintenance of TETCO's twenty (20") inch pipeline nor did Marathon contribute to the

cost of repairs to the ruptured pipeline.

In TESTBANK, the Fifth Circuit adopted a bright line rule by formulating the Robins rule as "physical damage to a proprietary interest [is] a prerequisite to recovery for economic loss in cases of unintentional maritime tort." TESTBANK at 1020. The court reasoned that the predictability of the rule outweighed the fact that it can lead to results "at its edge that are said to be 'unjust or unfair'" id at 1029. Additionally, the court explained that most of the economic losses could be covered by first party or loss insurance which is less costly than and preferable to liability insurance and concluded that "denying recovery for pure economic losses is a pragmatic limitation

on the doctrine of foreseeability, a limitation [the Fifth Circuit found] to be workable and useful." Id at 1032. Since, in the case at hand, Marathon has not sustained injury to a proprietary interest as contemplated by the Robins-TESTBANK rule and the facts of the present case do not place Marathon in the same position as Domar was in Domar Ocean Transportation Ltd. v. M/V ANDREW MARTIN, 754 F.2d 616 (5th Cir. 1985), the motion of defendants pursuant to Fed. R. Civ. P. 41(b) is hereby GRANTED dismissing the claims of Marathon Oil Company for deferred oil and gas production for the period during which the twenty (20") inch TETCO line was out of commission.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

TEXAS EASTERN TRANSMISSION CO.

V.

McMoRAN OFFSHORE EXPLORATION CO., ET AL

CIVIL ACTION NO. 83-1584
and consolidated cases

SECTION "E/2"

September 16, 1987

FINDINGS AND CONCLUSIONS

Texas Eastern Transmission Corporation (TETCO), owner of a 20-inch natural gas pipeline installed on the floor of the Gulf of Mexico, brought suit for damage which was sustained to a portion of its pipeline on January 1, 1983. Made defendants were McMoRan Offshore Company (McMoRan), Faustug Marine Corporation (Faustug), John E. Chance & Associates (Chance), Ocean Drilling and Exploration Company (ODECO), and three tugs, Z/P CHALONE, Z/P CAYMUS and Z/P CONDON, operated by Faustug. This suit and the accident subject of this suit caused a substantial maze of litigation which will be explained below after the details of the disaster are set forth.

DETAILS OF DISASTER

> After a misfortune has happened, it is easy to see how it might have been avoided. Goslee v. Shute's Executor, 59 U.S. (18 How.) 463, 466 (1855).

On November 11, 1982, Superior Oil Company (hereinafter "Superior") and Pennzoil Company (hereinafter "Pennzoil") assigned their right to use ODECO's semi-submersible drilling rig, D/B OCEAN TRAVELER to McMoRan. At the time of the assignment, the D/B OCEAN TRAVELER was located in the Gulf of Mexico in Block 316 Eugene Island Area. Pennzoil assigned the D/B OCEAN TRAVELER to McMoRan for the drilling and completion of a well in Block 107 West Delta Area in the Gulf of Mexico off the coast of the State of Louisiana and also entered into a farmount agreement.

wherein Pennzoil retained a 34% ownership interest in the lease of Block 107 West Delta Area. Therefore, the D/B OCEAN TRAVELER had to be moved from Block 316 Eugene Island Area to Block 107 West Delta Area. In preparation for the move, McMoRan and Pennzoil on behalf of McMoRan procured the necessary towing services, surveying services, anchor handling services and various other services.

The tugs Z/P CAYMUS, Z/P CHALONE and Z/P CONDON owned by Tractug Associates (Tractug) and operated by Faustug were initially retained by Pennzoil to tow the D/B OCEAN TRAVELER to West Delta Block 107. Once the anchors were racked on the D/B OCEAN TRAVELER in Block 316 Eugene Island Area in preparation for the move, McMoRan

had the opportunity to replace the Faustug towing package. In the event McMoRan chose another towing company, McMoRan would have to pay for demobilization of the Faustug vessels and mobilization of additional towing vessels to replace the Faustug vessels. McMoRan chose to retain the services of Faustug.

The anchor boat, M/V MUSTANG ISLAND, owned by Arthur Levy Enterprises, Inc. (hereinafter "Arthur Levy") was used in raising and racking the anchors at the Pennzoil location as well as to set the anchors at the McMoRan location in Block 107 West Delta Area. An anchor handling crew from International Mooring & Marine[2]

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[2] International Mooring & Marine is not a party to this lawsuit nor is any employee of International

(I M & M) worked on board the anchor boat in connection with the handling of the anchors.

On December 7, 1982, McMoRan hired Chance to perform the services of a survey outfit to assist in moving the D/B OCEAN TRAVELER onto location and to assist in stabilizing the rig over the drill site in Block 107 West Delta Area. Chance had the responsibility to evaluate the intended rig site and offer information and recommendations pertinent to the rig site.

On the morning of December 28, 1982, Z/P CONDON was made fast to the starboard inboard tow line and Z/P CAYMUS was made fast to the port outboard tow line. Z/P

Mooring & Marine.

CHALONE was also fast to the D/B OCEAN TRAVELER, acting as lead tug. Equipment was offloaded from the rig at this time. The rig was ballasted and the anchors lifted. During this time, Pennzoil representatives departed the rig and around 0200 hours on December 28, 1982, Bobby Craft, a representative of McMoRan, boarded the D/B OCEAN TRAVELER. The move began around 0200 hours on December 29, 1982.

On December 30, 1982, M/V ATLANTIC SURVEYOR (the Chance survey boat) departed Fourchon, Louisiana for the intended location in Block 107 West Delta Area. The survey party included Glenn Miller as party chief, Rodney Frederick as captain, and instrument men, Ronald Smith, Richard Eisle and Randy Menard. Upon arrival in block

107, the M/V ATLANTIC SURVEYOR dropped the instrument men off at three fixed platforms - Menard at Marathon Platform 86A; Eisle at Marathon Platform 109A; and Smith at Shell Platform 104D. By approximately 2300 hours on December 30, 1982, the M/V ATLANTIC SURVEYOR had dropped the location buoys and the anchor buoys in Block 107 marking the drill site and the location where the D/B OCEAN TRAVELER's eight anchors were to be dropped.

At approximately 1700 hours on December 31, 1982, the tow stopped about three miles from the proposed location (commonly referred to as the "staging area") to permit the tugs to shorten their tow lines from 1700 feet to about 1/2 that length. For greater maneuverability the

M/V MUSTANG ISLAND was given pendant wire to the No. 6 and No. 7 anchor buoys.

Aboard the D/B OCEAN TRAVELER in addition to Mr. Craft, was barge engineer, Norman L. "Sleepy" Terrebone, who had relieved Wayne "Bebop" Gregory at approximately 1030 hours December 31, 1982 while the rig was under tow. Among others aboard the D/B OCEAN TRAVELER was Lee J. Trahan as the toolpusher and David Stogner, the ODECO rig superintendent.

After the tow lines were shortened, Sleepy Terrebone requested the survey vessel, M/V ATLANTIC SURVEYOR, to stand by the marker for the No. 6 anchor location and requested the anchor boat, M/V MUSTANG ISLAND, to stand by the No. 7 anchor. The D/B OCEAN TRAVELER passed between the No. 6

and No. 7 anchor buoys (referred to as the "gate buoys") and dropped its No. 6 and No. 7 anchors. It is customary procedure to drop one or two of the rig's stern anchors as the rig passes through the gate buoys. The rig's two anchors act as a brake to assist in slowing the rig to a halt on or near the proposed well site. After the anchor boat places the other six anchors in their specified location, the anchor boat returns to the No. 6 and No. 7 anchors and places them in their specified positions.

As the D/B OCEAN TRAVELER passed through the "gate buoys" on December 31, 1983, it dropped the No. 6 anchor off the starboard stern at approximately 2100 hours and paid out between 1500 and 2000 feet of chain. At approximately 2110 hours, anchor

No. 7 was dropped off the port stern and approximately 1000 to 1200 feet of anchor chain was paid out to it.

After the No. 6 and No. 7 anchors had been dropped, the captain of the anchor boat, Paul S. Percle, informed the D/B OCEAN TRAVELER that the anchor boat could not continue operations due to severe weather conditions. Severe weather caused the buoys to disappear, which precluded the anchor boat from running the rig's anchors out to their specified locations and the seas became too rough to permit the crew to perform the anchor operations on the 168 foot boat, M/V MUSTANG ISLAND.

After the anchor handling operation had been discontinued, the rig personnel decided ~~to stay~~ on location and wait for

the storm to end. Terrebone inquired if the Faustug vessels could hold the rig on a 090 heading (due east) into the wind and in position. The Faustug vessels replied they could do so.

At approximately 2130 hours on December 31, 1982, Terrebone asked for a "position shot" to determine the location of the rig and the party chief aboard the M/V ATLANTIC SURVEYOR responded that the auto tape aboard the vessel was inoperable and the M/V ATLANTIC SURVEYOR would not be able to inform the rig of its precise location.

Throughout the evening of December 31, 1982 Terrebone inquired whether the Faustug vessels were able to hold the rig on the 090 heading into the wind and seas.

Terrebone also told the tugs that if needed, the rig could drop the No. 2 and No. 3 anchors in order to assist the tugs in holding the position of the rig. The Faustug vessels responded that they would be able to keep the rig on a 090 heading and that dropping the No. 2 and No. 3 anchors wold not be necessary.

Additionally, Steven F. Punchard, the control room operator aboard the D/B OCEAN TRAVELER, contacted the lead tug, Z/P CHALONE approximately every two hours to monitor the position of the rig during the night of December 31, 1982 and the morning of January 1, 1983. He was informed that the rig was being held in position on the 090 heading.

At approximately 0100 hours on January 1, 1983, the M/V ATLANTIC SURVEYOR received an operable set of auto tapes, but apparently did nothing with them.

At approximately 0140 hours on January 1, 1983, the tow line of the Z/P CAYMUS parted at the bulwark. The parting occurred where chafing gear is normally placed on the tow line to prevent the tow line from parting. Sleepy Terrebone spoke with the lead tug after the line parted and inquired whether the tugs (without the assistance of the Z/P CAYMUS) could hold the rig in location on the 090 heading and whether the rig should drop the bow anchors to help stabilize the rig's location. The lead tug responded, stating that it would not be necessary for the rig to drop its

bow anchors and that the rig would still be held on or near location on the 090 heading.

At approximately 0430 hours January 1, 1983, the Z/P CAYMUS passed a mooring line off its stern to the M/V MUSTANG ISLAND so the MUSTANG ISLAND could assist in turning the D/B OCEAN TRAVELER into the wind and seas. At 0500 an entry was made in the log book of the D/B OCEAN TRAVELER by Sleepy Terrebone. The entry states, "Holding rig 090 into the wind and sea. Survey boat said in area of location." The "log book" shows that the original entry at 0500 was clearly erased and written over in a darker pencil lead, perhaps at a different time. For this reason, I cannot conclude that the survey boat told the rig it was

still in the area of location at 0500 on January 1, 1983.

At approximately 0530, Robert Craft told an ODECO employee to contact the survey boat to determine the location of the rig. Either Sleepy Terrebone or Lee Trahan reported to Craft that the survey boat stated that the rig was three to four miles west of location. Finding it hard to accept that the rig had moved three to four miles in a westerly direction with two anchors weighing approximately 30,000 pounds each and with the aid of three tugs, both the ODECO personnel and Mr. Craft believed that Chance had placed the rig in the wrong Block on the previous night.

At approximately 0745 hours, January 1, 1983, the D/B OCEAN TRAVELER began to pull

in the No. 7 anchor chain with the assistance of the anchor boat, M/V MUSTANG Island.[3] By 1130 hours, January 1, 1983, the No. 7 anchor was successfully bolstered to the D/B OCEAN TRAVELER.

Once the No. 7 anchor was bolstered Sleepy requested that the anchor boat "chase out" the anchor chain because the No. 6 anchor flag was no longer visible.

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[3] Each anchor was attached by a 2" inch diameter chain to a windlass aboard the rig. Also attached to each anchor was a pendant line which was secured to an anchor buoy. Normally, in order to raise or lower an anchor, the anchor boat retrieves the buoy on board, then attaches the pendant line to its own wench and raises the anchor from the bottom. The windlass aboard the rig is used to take on or let out the chain while the anchor boat is handling the anchor.

The anchor boat would not chase out the chain because it feared the No. 6 anchor buoy had sunk into the Gulf and if the anchor boat were to run over the buoy, the anchor boat would sustain damage.

Instead, the M/V MUSTANG ISLAND made up to the port stern of the D/B OCEAN TRAVELER to assist the rig in "walking back" toward the location of the No. 6 anchor. The Faustug vessels reduced power at the bow of the rig and the windlass on the rig was used to pull in the anchor chain until the D/B OCEAN TRAVELER was positioned over the NO. 6 anchor. The winching would continue in an attempt to unseat the anchor. The rig personnel experienced substantial difficulty in attempting to unseat the No. 6 anchor. The anchor windlass on board the

rig was brought up to a maximum power of 600 amps and would overheat. As the motor overheated, the automatic shut down on the motor would engage and "cut out".

Sometime between 1500 and 1600 hours, January 1, 1983, Craft, the McMoRan representative aboard the D/B OCEAN TRAVELER, decided to have operations shut down in order to determine if there were any pipelines in the area. Craft met with ODECO's Trahan, Stogner, and Terrebone to discuss the possibility of the No. 6 anchor being hooked on a pipeline. All persons involved knew the rig was in the southwest corner of Block 106, that a pipeline ran 500 feet west of the Block 105/106 border, and that the anchor had approximately 600 feet to chain out. At the meeting, the

ODECO people explained to Craft that in the past they had experienced similar troubles raising anchors in the Block 106 West Delta Area because the bottom in that area is known for its silt and "gumbo" texture which permits deep anchor penetration and causes difficulty in anchor retrieval. After this meeting it was the consensus of those on board the D/B OCEAN TRAVELER that retrieval of the No. 6 anchor should begin again.

At approximately 1735 hours, a large black mushroom cloud erupted from the Gulf of Mexico off the D/B OCEAN TRAVELER's starboard stern. The rig's No. 6 anchor had ruptured TETCO's 20-inch natural gas pipeline, spilling 30 million cubic feet of gas under 1150 pounds per square inch

pressure into the atmosphere.

Since the chain to the No. 6 anchor remained taught after the rupture, the D/B OCEAN TRAVELER was moving toward the white water aeration caused by the gas from the TETCO line. Those on board the rig attempted to slack off the wench in order to get the rig away from the gas fearing that exhaust from the rig would cause the gas to ignite.

At approximately 1800 hours on January 1, 1983, the No. 6 anchor chain was cut with about 400-500 feet of anchor chain out. The Faustug vessel then began the attempt to return the D/B OCEAN TRAVELER to the original location in Block 107 West Delta Area. Six lawsuits emanated from the above described accident. The cases were

consolidated and tried in this Court. A description of said cases is as follows:

TEXAS EASTERN TRANSMISSION COMPANY V. MCMORAN, ET AL
CIVIL ACTION NUMBER 83-1584

TETCO, the owner of the 20-inch natural gas pipeline that was ruptured brought suit against McMoRan Offshore Exploration Company. Faustug, Chance, ODECO and in rem actions against the tugs Z/P CHALONE, Z/P CONDON and Z/P CAYMUS, claiming that on or about January 1, 1983, while the D/B OCEAN TRAVELER was under the care, custody and control of all aforementioned parties, the rig dropped its stern anchor (No. 6) which struck and severed its 20-inch natural gas pipeline.

McMoRan filed a third-party complaint against Chance alleging that the surveying

services of Chance were being performed pursuant to a written agreement between Chance and Pennzoil acting on its own behalf and on behalf of McMoRan and that pursuant to the provisions of said agreement, McMoRan is entitled to be indemnified and held harmless by Chance for all claims arising out of the casualty, subject of this suit. McMoRan also filed a third-party complaint against Fidelity & Casualty Company of New York, National Surety Corporation, Insurance Company of North America, Citadel Insurance Company, Underwriters at Lloyds and Insurance Companies in London and United States Fire Insurance Company alleging that said insurers had Protection and Indemnity (P & I) and/or excess policies covering Chance.

McMoRan also filed a third-party demand against Continental Insurance Company (Continental) alleging that Continental had in force a primary and excess policy covering Faustug and Continental should be required to indemnify and defend McMoRan.

Tractug Associates and Faustug have filed a third party complaint against Arthur Levy,[4] in its capacity as owner and operator of the anchor boat the M/V MUSTANG ISLAND. Arthur Levy was not named as a direct defendant by TETCO. Tractug and Faustug along with their insurer,

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[4] Although the third-party demand was brought on behalf of Tractug and Faustug, only Faustug was named as a defendant by TETCO. Faustug was the operator of the three tugs while Tractug was the owner of the three tugs.

Continental, have filed cross-claims for indemnity and/or contribution against Chance, ODECO, McMoRan, Fidelity and Casualty Company of New York, National Surety Corporation, Insurance Company of North America, Citadel Insurance Company, Underwriters at Lloyds and Insurance Companies in London, and United States Fire Insurance Company.

ODECO has filed claims for indemnification and/or contribution against McMoRan, Chance, Fidelity and Casualty Company of New York, National Surety Corporation, Insurance Company of North America, Citadel Insurance Company, Underwriters at Lloyds and Insurance Companies in London and United States Fire Insurance Company, Arthur Levy and

Continental. ODECO has also sued Liberty Mutual Insurance Company as the general liability and contractual liability insurer of McMoRan. Additionally, ODECO has tendered Continental as a direct defendant to both TETCO and Marathon.

Arthur Levy has filed a counter-claim against Faustug.

The insurers, Fidelity and Casualty Company of New York, National Surety Corporation, Insurance Company of North America and Citadel Insurance Company have filed claims against ODECO alleging there is no coverage provided for the claims of ODECO and therefore these insurers are entitled to recover attorney's fees from ODECO.

United States Fire Insurance Company has filed claims for indemnification and/or contribution against McMoRan and ODECO.

FAUSTUG AND TRACTUG PETITION FOR EXONERATION FROM OR LIMITATION OF LIABILITY CIVIL ACTION NUMBERS 83-3236; 83-3237 AND 83-3238

After TETCO filed its complaint in 83-1584, Tractug and Faustug, in their capacities as the owners and operators of the Z/P CHALONE, Z/P CONDON and Z/P CAYMUS, petitioned for exoneration from and/or to limit their liability with regard to aforesaid vessels. Tractug and Faustug filed a separate complaint for each vessel and along with their insurer, Continental, filed Ad Interim stipulations of $3,290,362.33 for the Z/P CHALONE; $3,290,362.23 for the Z/P CONDON, and

$3,940,362.33 for the Z/P CAYMUS, binding themselves, jointly, severally and in solido for the payment of said amounts. The Ad Interim stipulations have accrued interest at the rate of 6% per annum since June 29, 1983. TETCO, McmoRan, Chance and ODECO answered and filed claims in the limitation proceedings filed on behalf of Tractug and Faustug.

MARATHON ET AL CLAIM FOR DAMAGE
TO 12-INCH PIPELINE
CIVIL ACTION NO. 83-6274

Marathon Oil Company, Hess Pipeline Company, and The Louisiana Land and Exploration Company filed a complaint against McMoRan, Faustug, ODECO, the tugs and the D/B OCEAN TRAVELER for costs and expenses incurred in the inspection, testing and preservation of a 12-inch

pipeline running near and parallel to the TETCO 20-inch pipeline that was ruptured. (Civil Action No. 83-6247). Damage to the 12-inch pipeline was sustained when an anchor of the D/B OCEAN TRAVELER was dragged over the pipeline.

MARATHON ET AL CLAIM FOR LOSS OF PRODUCTION CIVIL ACTION NO. 83-6275

Marathon also filed Civil Action No. 83-6275 claiming damages for "loss of production" allegedly sustained by it as a result of the ruptured 20-inch TETCO line.

All six cases were consolidated and tried on the issue of liability on prior dates. The claim of Marathon for loss of production (CA No. 83-6275) has been dismissed by this Court pursuant to Fed.R.Civ.P. 41(b). (See Record Documents

293 and 301). The claim of Marathon for costs and expenses incurred in the inspection, testing and preservation of the 12-inch pipeline, Civil Action No. 83-6274, has been settled among the parties.

Prior to trial of the remaining TETCO claim (and the three claims in limitation) TETCO entered into a settlement agreement with ODECO, Faustug, Tractug and Continental wherein the aforesaid parties paid TETCO $9,501,184.72 in return for a release from TETCO and an assignment of TETCO's rights in this litigation. Armed with said assignment, ODECO, Faustug, Tractug and Continental have pursued TETCO's claims against all remaining parties as well as their own claims in their respective capacities. This Court is

faced with the onerous task of first, apportioning fault among the many players, all pointing fingers at the "other guy"; second, ruling on the various alleged indemnity agreements by and between various parties; thirdly, determining whether McMoRan enjoys the status of "additional assured" on a policy of insurance issued to Pennzoil by Continental and, finally, whether Continental is in bad faith for failing to provide coverage to McMoRan as an additional assured and further by filing a claim against McMoRan for indemnity and/or contribution and pursuing McMoRan in accordance with the assignment by TETCO.

FAULT OF THE PARTIES[5]

To say the least, the move of the D/B OCEAN TRAVELER was not performed very professionally, as the ruptured 20-inch pipeline so vividly illustrates. Nearly every party to the operation was at fault in causing the rupture, for a little amount of perception and effort on the part of any party to the move could have easily prevented it. As explained below, the fault in the case is to be allotted among Faustug, ODECO, McMoRan and Chance, who

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5 When two or more parties have contributed by their fault to cause property damage in a maritime collision, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault. United States v. Reliable Transfer Co., Inc., 421 U.S. 397, 411 (1975).

were in a position to prevent the accident had one of them exercised requisite reasonable care.

FAUSTUG

After the rig had dropped its two stern anchors and operations were shut down because the anchor boat, M/V MUSTANG ISLAND, could not operate in such severe weather, personnel aboard the rig expressed concern whether the tugs would be able to hold the rig into the wind and in the area of location. However, as evidence at trial proved, the rig actually moved or was caused to move in a direction westward from location in Block 107 to Block 105 approximately 3.5 miles from location. The tugs continually reassured the rig that it was being held on a 090 heading in the area

of location. Additionally, the testimony by deposition of Steve Punchard, the rig's control room operator, shows that Mr. Punchard contacted the Faustug vessels every two hours throughout the evening of December 31, 1982 and the early morning hours of January 1, 1983 and informed the tugs that the rig's bow anchors could be dropped in the event that the tugs were not able to hold the rig in position. However, the rig was repeatedly informed by the tugs that they were successful in holding the rig into the wind and on or about location and the dropping of additional anchors would not be necessary.

Although the rig moved 3.5 miles through the evening of December 31 and the morning of January 1, the tugs were unaware

of the movement. Had the tugs, through the evening of December 31, 1982 and the early morning of January 1, 1983, plotted their positions at regular intervals based on their LORAN-C units or by use of their radar, they would have been aware of the rig's movement and could have alerted the rig personnel who could have dropped additional anchors to prevent further movement into the area where TETCO's 20-inch natural gas pipeline was located. Additionally, the rig was not held by the tugs on a 090 heading into the wind, even though the tugs repeatedly told the rig that the 090 heading remained fixed. This exposed a side of the rig to strong winds and storm and facilitated the rig's westward movement. Throughout the rig's

movement in a westerly direction from Block 107 to Block 105, the tugs knew the No. 6 and No. 7 rig anchors were down and therefore had a greater duty to keep the rig on location to prevent the obvious dangers created by a rig dragging two anchors weighing approximately 30,000 pounds each. All of these acts of negligence on the part of Faustug, as operator of the Z/P CAYMUS, Z/P CHALONE and Z/P CONDON, contributed to and caused the rupture of TETCO's 20-inch pipeline.

Additionally, I find that the tugs were unseaworthy and their unseaworthiness was also a proximate cause of the damage to TETCO's 20-inch pipeline.

The owner of a vessel is not required to provide an accident free ship, but he

must provide a vessel and appurtenances on that vessel that are reasonably fit for their intended use. Mitchell v. Trawler Race, Inc., 362 U.S. 539 (1960). Also, the owner of a vessel is obligated to provide a vessel with proper working appliances and equipment. Id.

Evidence at trial showed that the lead Tug, M/V CHALONE was unseaworthy because it failed to have a properly functioning LORAN-C unit on board. The lack of this unit prohibited the tug from properly plotting the location of the rig and tugs throughout their westward movement. A functioning LORAN or the proper use thereof could have alerted all to the rig's westward movement and prevented the accident from occurring.

Evidence also established that the tow line of the Z/P CAYMUS parted at approximately 0140 hours on January 1, 1983, because the appropriate chafing gear was not in proper place on the tow line. With chafing gear in the proper location, the tow line would have been less likely to part and with three tugs instead of two it would have been less likely that the rig would have presented its side to the strong wind which facilitated the rig's westward movement.

It is well established that the incompetence of a crew can render a vessel unseaworthy. Orient Mid-East Lines v. A Shipment of Rice, 496 F.2d 1032 (5th Cir. 1974). Many of the crew members aboard the Faustug tugs were engaged in their first

towing operation of this magnitude. When engaged in this type of rig move, Faustug owes a duty to provide personnel more experienced than those provided on this particular towing operation. The inexperience of the tugs' crew rises to the level of incompetence that amount to creating unseaworthy vessels. A seasoned crew would have been more likely to take notice of the rig's westward movement by use of radar or satellite navigation units and would have taken steps in an attempt to prevent said movement.

ODECO

The negligence of ODECO is rather obvious. ODECO owned and manned the D/B OCEAN TRAVELER. Aboard the rig during the move from Block 316 Eugene Island Area to

Block 107 West Delta Area where, among others, Norman Leon "Sleepy" Terrebone, an experienced barge engineer, operating as rig mover, Lee Trahan, the senior ("day") tool pusher and David Stogner, a drilling superintendent. On the morning of January 1, 1983 after the No. 7 anchor had been successfully bolstered, Bobby Craft, representative of McMoRan, requested that the retrieval of the No. 6 anchor cease. Once the retrieval stopped, Craft met with Terrebone, Trahan and Stogner to discuss the possibility of a pipeline being in the area and interfering with the retrieval of the No. 6 anchor. During the discussions about the difficulty in unseating the No. 6 anchor, the ODECO personnel informed Craft that they had encountered similar

problems in that area of the Gulf before. The ODECO personnel informed Craft that the bottom in that area is known for its "gumbo" or "silty" bottom which permits deep anchor penetration and creates difficulty in anchor retrieval. Evidently, the ODECO personnel were able to convince Craft that retrieval of the No. 6 anchor should recommence. The decision to recommence retrieval was a joint decision of all participants in the discussion. Unfortunately, the decision proved to be imprudent as the ruptured pipeline illustrates. The ODECO personnel and the McMoRan representative made this decision with the knowledge that the rig had drifted from Block 107 westward to the southwest corner of Block 106, that the No. 6 anchor

had approximately 600 feet of chain out and that there existed a pipeline approximately 500 feet inside (West) of the Block 105/106 border.

Although aboard the rig were a number of seasoned ODECO personnel not one suggested that operations be suspended until it could be determined whether anchor No. 6 was hooked on a pipeline or another underwater obstruction.

MCMORAN

Although there are numerous allegations of fault on the part of McMoRan (predominantly alleged by ODECO), none have merit except for the contention that in exercising his right to intervene, Mr. Robert Craft did so in an imprudent fashion. Although Craft was the first

individual aboard the rig to exercise care in requiring retrieval operations on anchor No. 6 to be shut down, he was negligent in deciding (along with ODECO personnel) that retrieval of the No. 6 anchor should recommence. Mr. Craft possessed the same information as did the ODECO personnel- that the rig was in the southwest corner of Block 106; that the No. 6 anchor had approximately 600 feet of chain out; and that there existed a pipeline approximately 500 feet inside of the Block 105/106 border. Accordingly, Craft was just as negligent as the ODECO personnel and Crafts negligence, as was ODECO's negligence, is a proximate cause of the damage sustained to TETCO's 20-inch natural gas pipeline.

ODECO alleges that McMoRan should be held at fault for violations of regulations that the Secretary of the Interior has promulgated under the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 et. seq. which concern the duty of a lessee to maintain safe and workmanlike conditions:

> (a) The lessee shall perform all operations in a safe and workmanlike manner and shall maintain all equipment in a safe condition for the protection of the lease and associated facilities, for the health and safety of all persons, and for the preservation and conservation of property and the environment.
>
> (b) The lessee shall immediately take all necessary precautions to control, remove, or otherwise correct any hazardous oil and gas accumulation or other health, safety, or fire hazard.

30 C.F.R. §205.46.

The law of the Fifth Circuit makes it clear that ODECO's contention lacks merit:

> This regulation [30 C.F.R. 205.46] does not make lessees insurers of their work areas. Copeland v. Gulf Oil Corp., 672 F.2d 867, 868 n. 2 (11th Cir. 1982). The act does not 'impost liability upon a lessee based upon violation of a departmental regulation when that lessee is admittedly free from fault'. Olsen v. Shell Oil Co., 561 F.2d 1178, 1189 (5th Cir. 1977). A breach of the regulation provides no federal civil cause of action. Id. Furthermore, these regulations are in no way analogous to safety regulations which require a specific standard of conduct in particular situations', and establish no special standard of care in a negligence action. Bourg v. Texaco Oil Co., 578 F.2d 1117, 1120 (5th Cir. 1978).

Creppel v. Shell Oil Company, 738 F.2d 699, 702 (5th Cir. 1984).

Additionally, in Bourg v. Texaco Oil Co., 578 F.2d 1117, 1121 (5th Cir. 1978) the court held that the regulations do not

create a form of vicarious liability for the acts of an independent contractor.

ODECO also asserts that McMoRan should be held liable for hiring incompetent independent contractors. Assuming arguendo that some of the independent contractors hired by McMoRan were incompetent no evidence at trial tended to show that said incompetence was known by McMoRan. Additionally, a principal who hires independent contractors over which he exercises no operational control, has no duty to discover and remedy hazards created by its independent contractors. Wallace v. Oceaneering International, 727 F.2d 427 437 (5th Cir. 1984).

Finally, I find the claims by ODECO that employees of McMoRan involved in the

company's shoreside operations were negligent in failing to provide weather and any other information to the rig lack merit.

CHANCE

Counsel for Chance takes the position that all allegations against Chance are attempts to impose liability upon the survey company for duties that were outside the scope of its performance under its contract with McMoRan. Chance argues that the rig personnel could not reasonably rely upon the survey vessel standing by location three and one-half miles away from the ruptured pipeline to accurately monitor its position, the position of its anchors and where the anchors were in respect to the location of the pipeline.

Chance correctly points out that even assuming that it had a duty to inform ODECO of the rig's location on the morning of January 1, 1983 prior to the rupture, such information would not have made a bit of difference. As previously explained, prior to deciding to recommence the retrieval of anchor No. 6 the McMoRan representative, Craft, and the ODECO personnel all possessed the information relating to rig location and pipeline location. Had this information been supplied by Chance to those on board the rig, it is likely the decision to retrieve the No. 6 anchor would still have been made.

However, I do find negligence on behalf of Chance which was a proximate cause of the rupturing of the 20-inch pipeline. As

previously mentioned, the D/B OCEAN TRAVELER came on to location on December 31, 1982 when it dropped its two stern anchors. The M/V ATLANTIC SURVEYOR, operating as a survey boat had dropped an instrument man at Marathon Platform 86A (Randy Menard); at Marathon Platform 109A (Richard Eisle); and at Shell Platform 104D (Ronald Smith) and was waiting to assist the D/B OCEAN TRAVELER once the rig approached location. After the rig's stern anchors had been dropped and the anchor running operations had been shut down awaiting better weather, those aboard the M/V ATLANTIC SURVEYOR and the three instrument men aboard the various platforms observed the movement of the D/B OCEAN TRAVELER from in the area of location

westward out of sight. Obviously, Chance knew the rig was moving and also knew that those on board the rig as well as the crew on the Faustug tugs did not intend to permit the rig to move off of location. It was a well known fact to all that the instructions given by the rig to the tugs was to hold the rig on a 090 heading in position at location in Block 107 West Delta Area. However, given this knowledge, every one on board the M/V ATLANTIC SURVEYOR and all three of the instrument men on the various platforms remained stone silent. Once the rig was moved on to location, Chance owed the duty to see that the rig was properly positioned on location over the intended drilling site. Chance argues that once the anchor running

operation had ceased due to inclement weather, it no long had any duty to the rig to monitor the rig's position, despite specific requests by ODECO personnel as to the position and movement of the D/B OCEAN TRAVELER. I find that a prudent surveyor, faced with the same facts and conditions that Chance was faced with on December 31, 1982 and January 1, 1983, would have stood up and spoken and told the rig and tugs, "although you intend to remain in the area of location, you are (have drifted) a substantial distance westward", or something of the like in saltier vernacular. The silence of Chance along with its failure to give the rig a "position shot" when specifically asked for constitutes negligence and said negligence

is a proximate cause of the rupturing of the pipeline. Had Chance been more prudent, the rig would have known that, despite the representations made by the tugs, the rig was actually moving westward and could have dropped its bow anchors to prevent further movement or could have told the tugs that they were failing in their mission.

ARTHUR LEVY

Both ODECO and Faustug have filed claims against Arthur Levy, owner and operator of the anchor boat, the M/V MUSTANG ISLAND.

The first allegation of fault on part of Arthur Levy is that the MUSTANG ISLAND's master, Captain Percle, did not inform the rig personnel that the rig was three to

four miles off of location as soon as he knew about it. Evidence at trial showed that Captain Percle learned of the westward movement of the rig at the same time every one else learned, namely, around 0530 hours, when the survey boat reported that the rig was three and one-half miles from location. Assuming arguendo that the anchor boat had the duty to inform the rig of its location,[6] its failure to inform the rig of its location, considering all other evidence herein discussed, clearly is not a proximate cause of the rupturing of the pipeline. For this reason, I find this

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[6] By assuming this arguendo, I do not mean to even suggest that the anchor boat had this duty. On the contrary I see no authority tending to show that the anchor boat owed such a duty.

claim by ODECO and Faustug lacks merit.

The second and final allegations of fault on the part of Arthur Levy is that although Captain Percle advised the rig and tugs of an approaching thunderstorm, as the rig was moving onto location, he did not specifically tell them that if the approaching weather were severe enough, the anchor boat and crew might not be able to handle the anchor running operations. ODECO and Faustug maintain that somehow, Captain Percle's failure to so advise the rig and tugs was a proximate cause of the rupturing of the pipeline. Suffice it to say that this claim made by ODECO and Faustug is extremely speculative at best, highly absurd at worst. Accordingly, I find the second and final claim against

Levy by ODECO and Faustug lacks merit.

APPORTIONMENT OF FAULT

Based on the foregoing reasons, I find the percentage of fault attributable to the acts of the parties in causing the damge to TETCO's 20-inch natural gas pipeline to be as follows:

FAUSTUG	70%
ODECO	10%
MCMORAN	10%
CHANCE	10%
LEVY	0%

INDEMNIFICATION BETWEEN MCMORAN AND ODECO

In November of 1982 when Superior Oil and Pennzoil assigned the D/B OCEAN TRAVELER to McMoRan for the drilling and completion of a well in Block 107 West Delta Area, the assignment incorporated by

reference a drilling contract with McMoRan assuming all rights, duties and obligation of "Operator" once the D/B OCEAN TRAVELER had all anchors racked and was ready to move from Pennzoil's location in Block 316 Eugene Island Area and continuing until the rig completed the drilling operations and racked all anchors in preparation for a move from Block 107 West Delta Area. The drilling contract was assigned to and accepted by McMoRan.

The assignment also provided that the law governing the agreement shall be the General Maritime Law of the United States. The pertinent provision reads as follows:

> "Whenever the operations contemplated by this Agreement are conducted in, on or above the navigable waters of the United States, including any operations conducted on or above artificial

> islands or fixed structures, the law governing this Agreement shall be the General Maritime Law of the United States."

The drilling contract between McMoRan and ODECO contained, among others, the following indemnity provisions:

> "Operator [McMoRan] agrees that Contractor [ODECO] shall be released and relieved from, and agrees to indemnify, hold harmless and defend Contractor [ODECO] against any and all losses, claims, demands, damages and liabilities resulting from or arising out of damages to wells, pipelines, flowlines and any resulting pollution, or loss of production as a result of moving the drilling unit onto or off of, or operations conducted on, Operator's [McMoRan's] designated location, unless caused by the sole negligence of Contractor [ODECO]." (Art. VII, sub-part D of the Drilling Contract, Exhibit ODECO 19). (Emphasis added).

Exhibit "B" of the Drilling Contract required ODECO to procure certain insurance

coverage and "shall contain a waiver of subrogation in favor of [McMoRan]... for the liabilities assumed by Contractor [ODECO] hereunder: (emphasis added).

Accordingly, if the liability for the damage caused by the rupture of the TETCO 20-inch gas line is a liability assumed by ODECO, the insurance obtained by ODECO should contain a waiver of subrogation in favor of McMoRan. However, if the liability and damage arise as a result of the D/B OCEAN TRAVELER moving onto location (as per terms of the indemnity agreement) McMoRan will be forced to indemnify ODECO unless said damage is held to be caused by the sole negligence of ODECO.

ODECO takes the position that once the D/B OCEAN TRAVELER passed through the gate

buoys and dropped its two stern anchors the rig was in the process of moving onto location as it contemplated in the above quoted indemnity agreement. Accordingly, ODECO argues, the damage to TETCO's 20-inch natural gas pipeline occurred while the D/B OCEAN TRAVELER was in the process of moving onto location and therefore McMoRan should be required to indemnify ODECO for the damages caused by the fault of ODECO. McMoRan takes the position that the damages occurred about 3.5 miles west of location and at the time of the rupture the D/B OCEAN TRAVELER was not moving onto location as is contemplated in the above quoted indemnity provision.

In accordance with General Maritime Law:

> a contract of indemnity should be construed to cover all loses, damages, or liabilities which reasonably appear to have been within the contemplation of the parties, but it should not be read to impose liability for those losses or liabilities which are neither expressly within its terms nor of such a character that it can be reasonably inferred that the parties intended to include them within the indemnity coverage.

Corbitt v. Diamond M Drilling Co., 654 F.2d 329, 333 (5th Cir. 1981), Kemp v. Gulf Oil Corp., 745 F.2d 921, 924 (5th Cir. 1984), Babcock v. Continental Oil Co., 792 F.2d 1346, 1351 (5th Cir. 1986). Additionally, a maritime contract containing an indemnity agreement should be read as a whole and its words given their plain meaning unless the provision is ambiguous. Weathersby v. Conoco Oil Co., 752 F.2d 953, 955 (5th Cir. 1984) citing Lirette v. Popich Bros. Water

Transport, Inc., 699 F.2d 725, 728 (5th Cir. 1983). With these principles in mind, I address the present dispute over the applicability of the indemnity provision.

The language of the indemnity provision requires McMoRan to indemnify ODECO, inter alia, for damage to pipelines, as a result of "moving the drilling unit onto or off of, or operations conducted on Operator's [McMoRan's] designated location, unless [said damage is] caused by the sole negligence of contractor [ODECO]." Therefore, the issue before me is whether the damage caused to TETCO's 20-inch natural gas pipeline occurred as a result of moving the D/B OCEAN TRAVELER on to McMoRan's designated location (the well site in Block 107 West Delta Area).

Evidence at trial clearly showed that on December 31, 1982, the D/B OCEAN TRAVELER moved onto location when it passed through the gate buoys and dropped its No. 6 and No. 7 anchors. Thereafter, due to various forces, the D/B OCEAN TRAVELER ended up approximately 3.5 miles west of location, with its No. 6 anchor engaged in the 20-inch TETCO line. The 'moving onto location' has clearly been interrupted.

McMoRan takes the position that the drilling contract as a whole, shows that the parties intended that McMoRan be liable for damages occurring in the area of location in Block 107. To hold McMoRan liable for damages occurring approximately 3.5 miles from the area of location would run counter to the intent of the parties as

McMoRan sees it. McMoRan points to other provisions of the contract which further this argument. Specifically, the drilling contract contains requirements for the lease operator to determine the condition of the seabed at the drilling locations and to ensure that each location, including the anchor pattern is free and clear of obstacles and obstructions.

The drilling contract also requires the operator to furnish and pay for bottom condition surveys and other expenses in determining the condition of the bottom at each location prior to the contractor's moving onto location and to continue inspecting those conditions under and near the drilling units hulls and anchor pattern while on location. These provisions in the

contract show that it was the intent of the parties that McMoRan, as a lease owner in Block 107 was to be held responsible for damage occurring in the area of location and not for damage occurring 3.5 miles away from location.

Accordingly, I find that the liability for damage occurring 3.5 miles west of location does not reasonably appear to have been within the contemplation of the parties, is not within the express terms of the indemnity provision and it cannot be reasonably inferred that the parties intended to include such liability within the indemnity coverage. Accordingly, ODECO's claim against McMoRan for indemnity in accordance with the above quoted indemnity agreement is without merit. For

the same reasons, ODECO's claim against McMoRan's general liability insurer, Liberty Mutual Insurance Company, is also without merit.

MCMORAN'S CLAIM AGAINST FAUSTUG AND FAUSTUG'S INSURER, CONTINENTAL

On November 1, 1982, Tom Faust, President of Faustug, signed on behalf of Faustug Marine Corporation a blanket towing agreement with Pennzoil. Mr. Faust testified that the job of towing the D/B OCEAN TRAVELER from Eugene Island Block 316 to West Delta Block 107 was conducted under this blanket towing agreement.

In the towing agreement the rights and obligations of the parties are set forth using specific references to "COMPANY" and "CONTRACTOR." "COMPANY" is defined at the outset of the agreement as "Pennzoil

Company, and on behalf of all of its subsidiaries, affiliated companies, owners, co-owners, joint venturers associated therewith, and any of their agents, officers, and employees, hereinafter collectively referred to as 'COMPANY'..." (emphasis added). At trial, McMoRan introduced the original operating agreement for the West Delta 107 lease and a farmout of that lease which establish that McMoRan is a co-owner and joint venturer with Pennzoil in the West Delta 107 lease. Since McMoRan was a co-owner or joint venturer with Pennzoil, the obligations undertaken by Faustug in the towing agreement extended to McMoRan as a co-owner and joint venturer with Pennzoil.

In Paragraph X of the towing agreement Faustug agreed to provide hull, Protection and Indemnity (P & I), excess P & I, towers' liability, and pollution insurance in varying amounts. The agreement further provided:

> Any language in the policies...which limits the coverage afforded to an assured who is not a shipowner or who is not entitled to the rights of limitation to which a shipowner is entitled shall be deleted. All of the aforesaid policies shall name COMPANY, its affiliates and subsidiaries as Additional Assureds, and shall provide that all said insurers waive subrogation against COMPANY, its affiliates and subsidiaries.

Paragraph XI of the agreement then goes on to provide:

> In the event (1) CONTRACTOR shall fail to secure the insurance coverages set forth in the preceding paragraphs, with or

without the knowledge of COMPANY, or (2) any claims, demands, suits or causes of action, of whatever kind or nature, are brought against COMPANY which arise out of or are connected with, directly or indirectly, the performance of towage services by CONTRACTOR as provided herein, which for any reason are not covered by the insurance protection afforded COMPANY pursuant to the provisions of the preceding paragraph, then CONTRACTOR shall itself be an insurer to the extent it has failed to comply with the obligations to provide insurance hereunder, and further agrees to defend, protect, indemnify and hold COMPANY harmless with respect to all such claims, demands, suits and causes of action even though they arise or result directly or indirectly from the sole or concurrent negligence of COMPANY, whether active or passive, primary or secondary.

CONTRACTOR further agrees at its sole cost and expense to procure and continuously maintain in full force and effect throughout the term of this agreement, with reliable insurance companies, and with limits of liability as specified herein, Contractual Liability Insurance covering

CONTRACTOR'S undertakings in this agreement and particularly the undertakings set forth in this paragraph.

McMoRan's interpretation of the blanket towing agreement between Pennzoil and Faustug which governed the move from Block 316 Eugene Island Area to Block 107 West Delta Area is that Faustug agreed to do the following:

1) provide P & I and tower's liability insurance;
2) name Pennzoil and its co-owners and joint venturers (McMoRan) as additional assureds on those policies and have the insurers waive subrogation against Pennzoil and its co-owners and joint venturers;
3) have deleted from this coverage any language that would limit coverage to an assured who is not a shipowner (the "as owner" limitation would be deleted from the policy);
4) to the extent Faustug failed to obtain the coverage required in Paragraph X, Faustug itself became the insurer of Pennzoil and its

co-owners and joint venturers for any claims arising directly or indirectly out of the performance of towage services; and

5) to the extent claims arose directly or indirectly out of the performance of the towage services, which were not covered by the required insurance, Faustug agreed to indemnify Pennzoil and its co-owners and joint venturers from those claims.

The "as owner" limitation gained notoriety from the decision in Lanasse v. Travelers Insurance Co., 450 F.2d 580 (5th Cir. 1971) and its progeny. In Lanasse, the court held that additional assureds who were charterers of a vessel were not afforded coverage under the vessel's P & I policy because the policy covered only liabilities "as owner" of the vessel.

McMoRan, relying on Helaire v. Mobil Oil Co., 709 F.2d 1031, 1042 (5th Cir. 1983) argues that the deletion of the "as

owner" clause in the P & I policy that Faustug was required to obtain as per the terms of the blanket towing agreement, creates coverage in favor of McMoRan for the liabilities of McMoRan alleged by various parties to this suit to have caused the rupture to TETCO's 20-inch natural gas pipeline.

In essence, McMoRan argues that deletion of the "as owner" clause in the P & I policy would change the P & I policy to a general liability policy with McMoRan listed as an assured. To take it one step further, McMoRan is in essence arguing that the terms of the blanket towing agreement required Faustug to secure a P & I policy that because of the "as owner" deletion would function as a general liability

policy inasmuch as said policy would afford coverage to McMoRan for its own acts of negligence. This type of policy, although labeled "P & I" policy should clearly be classified as an extraordinary policy of insurance. As counsel for Continental points out, this broad interpretation of the blanket towing agreement would turn the P & I policy into a comprehensive general liability policy and Continental (or Faustug as the case might be) would become one of the most comprehensive general liability insurers around. It is the law of the Fifth Circuit that this extraordinary type of agreement will not be upheld unless the parties specifically, clearly, and expressly agree to such an agreement. Branch v. Fidelity and Casualty

Co. of New York, 783 F.2d 1289 (5th Cir. 1986); Knapp v. Chevron U.S.A., Inc., 781 F.2d 1123 (5th Cir. - 1986); Rodriguez v. Olin Corp., 780 F.2d 491 (5th Cir. 1986); Lanasse, supra.

I reject the construction that McMoRan gives to Paragraph X and XI of the blanket towing agreement because the parties have not specifically, clearly, and expressly agreed that Faustug would procure P & I insurance that would function as a comprehensive general liability policy in favor of McMoRan protecting McMoRan from its own acts of negligence. Additionally, the provision in Paragraph X of the blanket towing agreement is ambiguous and therefore is to be construed against the drafter (Pennzoil hence McMoRan). I further and

finally note that hold harmless, indemnity and other forms of exculpatory agreements are to be strictly construed. Marathon Pipeline Co. v. M/V SEA LEVEL II, 806 F.2d 585 (5th Cir. 1986); Branch, supra; Knapp, supra; Rodriguez, supra; Lanasse, supra.

Accordingly, the claim of McMoRan against Faustug and continental for indemnity lacks merit for the reasons set forth above.

MCMORAN'S CLAIM AGAINST CHANCE FOR INDEMNIFICATION

McMoRan has filed a claim for contractual indemnity as a third party beneficiary of the Pennzoil Master Service Agreement with Chance. McMoRan points to language in a Master Service Agreement between Pennzoil and Chance which states, inter alia, that Chance is to indemnify

Pennzoil and its co-owners and joint venturers for various liabilities including liabilities caused by the negligence of Pennzoil and its co-owners and joint venturers. McMoRan argues that because it is a co-owner or joint venturer with Pennzoil it is entitled to the same form of indemnification as is Pennzoil as per the Master Service Agreement.

McMoRan fails to acknowledge that on December 7, 1982 McMoRan hired Chance to perform the services of a survey outfit in assisting the moving of the D/B OCEAN TRAVELER from Block 316 Eugene Island Area to Block 107 West Delta Area. This agreement was separate from and unrelated to the Master Service Agreement in existence between Pennzoil and Chance. In

contracting with Chance to perform these services, McMoRan did not enter into a Master Service Agreement containing an indemnity provision with Chance. Nor did there exist a Master Service Agreement with an indemnity provision between McMoRan and Chance prior to the date McMoRan contracted with Chance for the survey services. Since no such indemnity agreement existed, I find that McMoRan's claim against Chance for indemnity lacks merit. Additionally, for the same reasons as stated above, McMoRan's claims against the insurers of Chance, Fidelity and Casualty Company of New York, National Surety Corporation, Insurance Company of North America, Citadel Insurance Company, Underwriters at Lloyds and Insurance Companies in London and United

States Fire Insurance Company likewise lack merit.

ODECO'S CLAIMS AGAINST CHANCE FOR INDEMNIFICATION

ODECO has filed a claim against Chance for contractual indemnity based on an indemnity provision found in a Master Service contract between ODECO and Chance. The pertinent provisions of the contract state:

> (1)(A) This Agreement shall control and govern all activities of contractor ("John E. Chance") in connection with the performance of all work by contractor for company ("ODECO") under work orders, oral or written, given on or after the date hereof by company to contractor. (parentheticals added).
>
> (B) With respect to any work performed by contractor pursuant to contracts or work orders with parties other than company on any drilling barges, vessels, platforms, installations or other

> property of any kind owned by, leased to, chartered to, or under the control of company, Sections 8, 9, 10 and 11 of this contract shall be applicable as between contractor and company with respect to the work so performed.

The contract by its own terms applies to situations when the Contractor (Chance) works for the Company (ODECO) or when Chance works for a company other than ODECO but said work requires that Chance work on the property (including drilling barges, vessels, or platforms, installations, or other property of any kind) of ODECO.

At the time of the rupture of TETCO's 20-inch pipeline, Chance was hired by and was working for McMoRan. Additionally, at the time of the rupture, Chance was not involved in working on or aboard the property of ODECO. Therefore, since the

obligation to indemnify is to be strictly construed, Marathon Pipeline, supra, I find that the indemnity agreement in the Master Service Agreement between Chance and ODECO does not apply to this situation by its own terms. Accordingly, ODECO's claim against Chance for contractual indemnity is without merit. For the same reasons, ODECO's claim against the insurers of Chance, Fidelity and Casualty Company of New York, National Surety Corporation, Insurance Company of North America, Citadel Insurance Company, Underwriters at Lloyds and Insurance Companies in London and United States Fire Insurance Company lacks merit. The aforesaid insurers' counter-claim against ODECO for attorney's fees is likewise without merit.

LIMITATION OF LIABILITY

Faustug and Tractug have filed in three separate civil actions for limitation of or exoneration from liability pursuant to 46 U.S.C. §183(a) which reads in part:

> The liability of the owner of any vessel, whether American or foreign, ... for any loss, damage or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending. (Emphasis added).

The burden of proof with respect to limitation actions was detailed in In re Ferry GEORGE PRINCE, 455 F. Supp 272, 281 (E.D. La. 1978):

> The determination of whether a shipowner is entitled to limit his liability is a two step process. First, the Court must determine what acts of negligence or conditions of unseaworthiness caused the accident. Second, the Court must determine whether the shipowner had knowledge or privity of those same acts of negligence or conditions of unseaworthiness. FOr it is only knowledge of those factors which are found to have actually caused the accident, and not just any negligent acts or unseaworthy conditions, which preclude a shipowner's ability to limit. Farrell Lines, Inc. v. Jones, 530 F.2d 7 (5th Cir. 1976). In determining this issue, the shipowner has the burden of proof in establishing a lack of privity or knowledge, while the initial burden of proving negligence or unseaworthiness rests on the claimants. Tihle v. Aldacosta, 544 F.2d 752 (5th Cir. 1977).

A review of the evidence in the present case shows Faustug and Tractug have failed to meet the burden of proving the lack of privity and knowledge of the owner of the

three tugs. It was determined at trial that the tugs were inadequately equipped when they broke ground prior to the accident subject of this lawsuit. The Loran equipment was inadequate, or not functioning properly, and the satellite navigation system was not reliable. The crew was incompetent. This shows a lack of due diligence by the owner of the tugs to make the vessels seaworthy prior to sailing. Accordingly the request by Faustug and Tractug for limitation of or exoneration from liability is without merit.